(2)

Supreme Court, U.S.
FILED
AUG 16 1996
CLERK

No. 96-99

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

KIRK DAHL, *et al.*, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CHARLES SCHWAB & CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the Minnesota Supreme Court

BRIEF *AMICUS CURIAE* OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

In Support of the Position of Petitioners

LEE POLSON
Counsel of Record
SHEINFELD, MALEY & KAY, P.C.
301 Congress Avenue, Suite 1400
Austin, Texas 78701
Attorneys for Amicus Curiae

---

25 pp

AUTHORITY TO FILE AND POSITION OF AMICUS CURIAE

This brief is filed pursuant to the Court's Rule 37.2 by written permission of the parties to the case, and their written permission is filed herewith. This brief supports the position of the Petitioner.

SPECIAL NOTICE PURSUANT TO RULE 29.4(c)

Since this proceeding draws into question the constitutionality of a Minnesota statute, and neither the State of Minnesota nor any agency, officer, or employee of Minnesota is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable. Therefore, counsel for *Amicus Curiae* have served a copy of this brief on the Minnesota Attorney General pursuant to Rule 29.4(c).

TABLE OF CONTENTS

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE* 1

REASONS FOR GRANTING THE WRIT 5

I. The Minnesota Supreme Court failed to follow recent Supreme Court rulings on preemption and called into question the federal-state securities regulatory scheme 7

A. The decision below incorrectly analyzed Congressional intent 7

B. This Court's recent decisions require careful analysis of claims of implied preemption 9

C. Rule 10b-10 does not conflict with common law claims 13

II. The decision below was unnecessarily broad 15

III. Judicial preemption is unwarranted in this case given the express language of Congress 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Baker Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101 (4th Cir. 1989) 10, 11

Cippolone v. Liggett Group, Inc., 505 U.S. 540 (1992) 5

Dahl v. Charles Schwab & Co., Inc. 545 N.W.2d 918 (Minn. 1996) 2, 4, 5, 7-9, 16

Dahl v. Charles Schwab & Co., Inc., Order and Memorandum of Minnesota District Court (April 7, 1994). 4

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 12

Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, 835 F.2d 1031 (3rd Cir. 1987) 12, 13

Freightliner Corp. v. Myrick, __ U.S. __, 115 S.Ct. 1483 (1995) 5, 16

Hillsborough County v. Automated Medical Lab Inc., 471 U.S. 707 (1985). 14

Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017 (6th Cir. 1979) 12, 14

Medtronic, Inc., v. Lohr, __ U.S. __, 116 S.Ct. 2240 (1996) 5-7, 9, 10, 13, 18

O'Melveny & Myers v. F.D.I.C., __ U.S. __,
114 S.Ct. 2048 (1994) 15

Pacific Gas & Electric v. State Energy Resources Comm'n, 461 U.S. 190 (1983) 8

Constitutional, Statutory, and Congressional Materials

U.S. Const. art. VI, cl. 2 5

The Securities Act of 1933:
15 U.S.C. § 77*l*(2) 11

The Securities Exchange Act of 1934:
15 U.S.C. §§ 78*a*, *et seq.* 2, 3
15 U.S.C. § 78*j* 5, 12-14
15 U.S.C. § 78*bb*(a) 5, 7, 16
15 U.S.C. § 78*bb*(e)(1) 17

21 U.S.C. § 360*k*(a) 10

Medical Device Amendments of 1976, 90 Stat. 539 10

H.R. REP. No 622, 104th Cong., 2d Sess. (1996). 17

SEN. REP. No. 293, 104th Cong., 2d Sess. (1996). 17

Regulatory Materials

Securities and Exchange Commission Rule 10b-10,
17 C.F.R. § 240.10b-10, Fed. Sec. L. Rep.
(CCH) ¶ 22,730 ..... 2, 4-6, 11, 12-16

Securities and Exchange Commission Rule 10b-5,
17 C.F.R. § 240.10b-5, Fed. Sec. L. Rep.
(CCH) ¶ 22,725 ..... 12, 13

Securities Exchange Act Rel. No. 34-33026,
58 F.R. 36262 [1993 Transfer Binder]
Fed. Sec. L. Rep. (CCH) ¶ 85,234 (Oct. 13, 1993) 3

Securities Exchange Act Release 34-34902,
59 F.R. 55006, [1994-95 Transfer Binder]
Fed. Sec. L. Rep. ¶ 85,444 (Oct. 27, 1994) 2, 3, 13-16

Other Materials

Francis J. Facciolo & Richard L. Stone, *Avoiding the Inevitable: The Continuing Viability of State Law Claims In the Face of Primary Jurisdiction and Preemption Challenges Under the Securities Exchange Act of 1934,* 1995 Colum. Bus. L. Rev. 525, 670-671 (1995) 17

LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION (3d ed. 1992) 12

RESTATEMENT (SECOND) OF AGENCY § 387 (1958). . . 13, 15

RESTATEMENT (SECOND) OF AGENCY § 388 (1958). 15

RESTATEMENT (SECOND) OF AGENCY § 424 (1958). . . 13, 15

No. 96-99

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

KIRK DAHL, *et al.*, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CHARLES SCHWAB & CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the Minnesota Supreme Court

BRIEF *AMICUS CURIAE* OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

This brief, filed on behalf of the North American Securities Administrators Association, Inc. ("NASAA"), addresses the question whether the assertion of state law claims, based on statutory and common law fraud and agency concepts, conflict

with Securities and Exchange Commission Rule 10b-10[1] and pose obstacles to the accomplishment of the purposes of Congress, expressed in the Securities Exchange Act of 1934. 15 U.S.C. §§ 78a, *et seq.*

NASAA is the association of the 65 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as the forum where securities regulators work together to protect investors at the grassroots level and to promote fair and open capital markets. NASAA speaks as the collective voice for its members in furthering those interests.

NASAA's interest in this case arises from the potential impact that the decision of the Minnesota Supreme Court[2] may have on state investor protection statutes and common law rights and remedies for fraudulent conduct by securities dealers. The Minnesota Supreme Court has ruled that Rule 10b-10 contains a comprehensive regulation of payment for order flow which impliedly preempts state laws and remedies that might affect that practice.

---

[1] 17 C.F.R. § 240.10b-10, Fed. Sec. L. Rep. (CCH) ¶ 22,730. Rule 10b-10 was amended October 27, 1994, effective October 2, 1995. Securities Exchange Act Release 34-34902, 59 F.R. 55006, [1994-95 Transfer Binder] Fed. Sec. L. Rep. ¶85,444. The Minnesota Supreme Court decided the case under the Rule as it existed prior to the 1994 amendments. The relevant portion of the pre-1994 Rule is reprinted in the Petition for Writ of Certiorari (hereafter, "Pet."), pp. 4-5. Rule 10b-10 deals with several aspects of disclosure in securities transactions and transaction confirmations. This case deals only with those provisions of Rule 10b-10 which regulate payment for order flow.

[2] The opinion of the Minnesota Supreme Court is reprinted in the Appendix to the Petition for Writ of Certiorari, Pet. App. 1a-19a, and reported at 545 N.W.2d 918. Future references to *Dahl* will be to the Minnesota Supreme Court opinion in 545 N.W.2d unless otherwise noted.

Payment for order flow is the practice of providing inducements such as cash payments from securities market center participants, including over-the-counter market makers and securities exchange floor specialists, to securities brokerage firms who receive orders for securities transactions and must route them to market centers for execution.[3] In this case, individual customers of a securities dealer, Respondent Charles Schwab & Co., Inc. (hereinafter "Schwab"), brought common law and statutory claims against Schwab for fraud and breach of fiduciary duty to the Plaintiffs in receiving order flow payments on customer orders without adequate disclosure to or consent from the customers. The Minnesota Supreme Court found the Plaintiffs' causes of action to be preempted by the Securities Exchange Act of 1934 and by regulations adopted by the Securities and Exchange Commission regarding order flow payments.[4]

The court below based its ruling on one aspect of the relief requested by Plaintiffs: payment to Petitioners of all "profits" allegedly obtained from order flow payments by Schwab without the "consent" of Petitioners, under the common law concept that profits obtained by an agent in a transaction belong to the principal. The court held that granting this one request for relief "might put an end to the practice of order flow

---

[3] A detailed discussion of payment for order flow is contained in the SEC's releases proposing and adopting the current version of Rule 10b-10, Securities Exchange Act Rel. No. 34-33026, 58 F.R. 36262 [1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,234 (Oct. 13, 1993); and Securities Exchange Act Rel. No. 34-34902, 59 F.R. 55006 [1994-95 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,444 (Oct. 27, 1994).

[4] Petitioners' causes of action and the proceedings of the courts below are described in Petitioners' Statement of the Case § II, Minnesota Court Proceedings, Pet. 13-16.

payments, which is allowed under federal law . . . ." and that the requested remedy "could frustrate the objectives of Congress and the SEC." *Dahl,* at 925. The court then reinstated the district court's dismissal of *all* of Plaintiffs' claims "in their entirety."[5]

The Minnesota Supreme Court's sweeping ruling threatens to upset the current balance between state and federal law in securities transactions and regulatory matters because the court failed to engage in a precise analysis of the federal interest that would be frustrated by continued application of state common law concerning agency and fraud. The court acknowledged in its opinion that Congress had not occupied the field of securities regulation nor expressly preempted the laws in question. *Dahl,* at 925-925. The Minnesota Supreme Court's opinion, though couched in terms of implied preemption, amounts to a holding that any state law or regulation which might impose any additional requirements on broker-dealer practices regarding payment for order flow is preempted if the law *might* impose requirements in addition to those set forth in Rule 10b-10.

The Minnesota Supreme Court dismissed Petitioners' causes of action without detailed analysis. Such a holding, without examination of the federal policy juxtaposed to state law underlying each claim, suggests that any state law or regulation which is extrinsic to Rule 10b-10 would impliedly be preempted by the endorsement of payment for order flow which the court itself inferred from the SEC rule. Rule 10b-10, however, does not conflict with several state policies and laws

---

[5] *Dahl v. Charles Schwab & Co., Inc.,* Order and Memorandum of Minnesota District Court (April 7, 1994). The Order is reprinted in the Appendix of the Pet., App. 34a-40a.

at work in the common law claims alleged in Petitioners' complaint. The court below erred because it considered Rule 10b-10 to invoke a single, national standard without comparing the Congressional intent of the Securities Exchange Act, especially as expressed in Section 10(b) and 28(a) of the Act, to state law and to the remedies requested. This reasoning fails the standards for implied preemption analysis employed in the recent decisions of this Court in *Medtronic, Inc., v. Lohr*, __ U.S. __, 116 Sup. Ct. 2240 (1996); *Freightliner Corp. v. Myrick*, __ U.S. __, 115 S.Ct. 1483 (1995); and *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

The court's analysis failed to carefully consider ways in which state and federal policy might be harmonized and made an unnecessarily broad holding which undermines many state laws, not just the one state remedy that the court found to be potentially conflicting. The holding in *Dahl*, therefore, is at odds with the existing law of the Supremacy Clause which this Court must address and, upon review, reverse.

REASONS FOR GRANTING THE WRIT

The Minnesota Supreme Court in this case has misapplied this Court's standards for review of common law and statutory causes of action for implied preemption under the Supremacy Clause.[6] The court below correctly identified securities regulation as an area in which Congress has neither expressly preempted state law nor occupied the field to preempt concurrent jurisdiction. Having correctly determined that preemption of state law could *only* occur in this case by implication, the court chose a blunderbuss approach rather than

---

[6] U.S. Const. art. VI, cl. 2 (reprinted in Pet., p. 2).

the careful analysis required by this Court in recent cases, applying only broad concepts of national conformity without regard to Congressional intent and without analyzing the relation of that intent to state laws. The result was a general holding that all state laws which even potentially conflicted with the Minnesota court's interpretation of the purpose of one federal agency's regulation must fall.

This Court must review the decision from Minnesota because the Minnesota Supreme Court's interpretation of SEC Rule 10b-10, and the Congressional purpose that lay behind 10b-10 and its enabling statute, leaves too little room for traditional state regulation of securities transactions and securities broker dealers. The decision below impermissibly restricts state common and statutory law in a way that runs contrary to the recent directions of this Court on both express and implied preemption analysis.[7]

After the Minnesota Supreme Court rendered its decision in this case, this Court issued its opinion in *Medtronic, Inc., v. Lohr, supra*. If full review is not granted by this Court, this case should be remanded for reconsideration and further proceedings consistent with the *Medtronic* decision.

---

[7] NASAA, as *amicus curiae,* also joins in the arguments presented in the Pet., "Reasons for Granting the Writ", Section II, that this Court should resolve the conflict that has arisen among other courts on this issue. This *amicus* brief, however, does not separately address those arguments.

I. The Minnesota Supreme Court failed to follow recent Supreme Court rulings on preemption and called into question the federal-state securities regulatory scheme.

A. The decision below incorrectly analyzed Congressional intent.

This Court has expressed two basic premises about the nature of preemption. First:

> [W]e start with the assumption that the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Medtronic, Inc., v. Lohr, supra,* at 2250.

Second, because "the purpose of Congress is the ultimate touchstone", the scope of preemption of a statute rests on a fair understanding of congressional purpose, including the structure and purpose of the statute as a whole. *Id.* The *Dahl* decision, at 922, took note of the presumption that state laws were not to be superseded but then seemingly disregarded that presumption in its preemption analysis. This error led the court below to an interpretation of the Securities Exchange Act which calls into question many aspects of state law regarding securities transactions.

The Minnesota Supreme Court's decision was devoted largely to a general discussion of preemption principles and a description of the business practice of payment for order flow.

After its description of order flow payments, the court took up the arguments made by each party that the express language of Congress on state preemption contained in Section 28(a) of the Securities Exchange Act,[8] was dispositive. The court

---

[8] 15 U.S.C. § 78*bb*(a).

rightly concluded that Congress had not expressly preempted state regulation of order flow payments, but that it remained necessary to determine whether "state regulation was impliedly preempted by the operation of federal law." *Dahl,* at 924.

The court below noted that, "State law is preempted if Congress has entirely displaced the possibility of state regulation or if state regulation conflicts with federal law."[9] Given the express language in the 1934 Act preserving state jurisdiction and the 60-plus year history of state and federal securities regulation, the court reached the unremarkable conclusion that Congress had not occupied the field of securities regulation.

This left the question whether Minnesota state law presented a conflict with federal law or an obstacle to carrying out Congressional intent. The court below found that the securities business is national in its scope and that order flow payment is widely used. The court focused on one aspect of the relief requested under common law of agency. The court relied on Respondent Schwab's representations regarding its ability to account for order flow payments to hold as follows.

> For Schwab to fully comply with these state agency law requirements, it would need to be able to ascertain the exact amounts of these profits in order to seek its clients' consent, or to remit them to its customers if consent were withheld. Since it cannot parse out order flow payments to such a degree, compliance with the potential consent requirements of Minnesota law might put an end to the practice of order flow payments, which is allowed under federal law. *Dahl,* at 925.

---

[9] *Id.*, at 924, citing *Pacific Gas & Electric v. State Energy Resources Comm'n,* 461 U.S. 190 (1983).

That was the "potential " conflict on which the court based its ruling that all claims made by Petitioners were preempted. The court's idea that "anything affecting a practice as widely utilized as this one will have a significant impact on the securities markets nationwide" is not the correct test for preemption. The question is not whether state law will affect a widespread business practice, even one that may appear to comply with a federal regulation, but whether the state law impedes a Congressionally mandated policy. The Minnesota Supreme Court merely identified order flow payments as widespread (and without analysis assumed that practice to be a "useful competitive tool") and based preemption on the ostensible national impact of state law *vis-a-vis* the practice. *Id.*

The court below found that order flow payment was at least tacitly approved by SEC regulations; therefore, state common law could not affect it, seemingly in any way, without obstructing Congressional intent. For example, the court below acknowledged (as did Respondent Schwab) that compliance with federal and state disclosure requirements was possible. *Id.* Why, then, did the court dismiss all causes of action? The answer is, because the court did not conduct the required analysis of federal versus state policy. Instead, the court was satisfied that any *potential difference* between state and federal law constituted an impermissible conflict.

B. This Court's recent decisions require careful analysis of claims of implied preemption.

In *Medtronic, Inc., v. Lohr, supra,* this Court addressed the extent to which a federal regulatory statute containing a preemption clause impliedly preempted common law tort actions. The claims involved in *Medtronic* were common law

claims for damages caused by a faulty pacemaker. Defendants claimed the common law claims were preempted by the Medical Device Amendments of 1976,[10] which empowered the Food and Drug Administration to provide minimum standards for such medical devices and preempted any state law "which is different from, or in addition to, any requirement applicable under this chapter to the device." 21 U.S.C. § 360*k*(a).

The Court in *Medtronic* considered the above language in the context of the "structure and purpose of the statute as a whole," 116 S.Ct. at 2251, and compared the federal statute with the purposes and effects of the state laws being challenged. The Court's examination of the legislative history of the statute at issue in *Medtronic* indicated that the purpose of the preemptive section was the fear that "regulatory burdens were related more to the risk of additional state and federal regulation, rather than to the danger of preexisting duties under common law." *Id.*, at 2253. Finding no overall intent to preempt common law actions, the Court then analyzed each individual state cause of action to determine, in each case, whether preemption was indicated. Such an analysis was not undertaken by the Minnesota Court in the present case.

The general rule is that state law may provide for additional remedies to those provided by federal law. Specific duties or requirements, sought to be imposed under state law, must be examined to determine whether each one is counter to basic federal policies. In *Baker Watts & Co. v. Miles & Stockbridge*, 876 F. 2d 1101 (1989), the Fourth Circuit considered whether federal securities law prohibits indemnification or contribution between wrongdoers in fraudulent securities offerings. That court held that no implied right of either contribution or

---

[10] 90 Stat. 539.

indemnification existed under § 12(2) of the Securities Act of 1933,[11] and that federal securities law preempted a state indemnification claim, but that federal policy did not preempt state claims for contribution from joint securities law violators. *Baker Watts,* at 876 F.2d 1102. The court noted the broad concurrent powers that Congress left to states in securities regulatory matters, including the ability of states to "provide additional rights and remedies which do not conflict with federal securities law." *Id.*, at 1107.

The *Baker Watts* decision found that state law claims for indemnification of wrongdoers under § 12(2) of the 1933 Act were preempted because "it would run counter to the basic policy of the federal securities laws to allow a securities wrongdoer . . . to shift its entire responsibility for federal violations on the basis of a collateral state action for indemnification." *Id.*, at 1108. The Fourth Circuit held, however, that contribution was not antithetical to Congress' purposes because, unlike indemnification, no express federal policy existed either for or against contribution. *Id.*, at 1107. *Baker Watts* indicates that preemption analysis under securities laws requires examination of individual causes of action in light of Congressional policy, and the decision repeats oft expressed support for the proposition that Congress left a broad array of securities regulatory matters and remedies to state law.

In this case the Petitioners filed suit for breach of common law duties of full disclosure, breach of common law duties under agency law, and statutory consumer protection laws. These duties are not inconsistent with the purposes of the Securities Exchange Act or Rule 10b-10.

---

[11] 15 U.S.C. § 77*l*(2).

State anti-fraud laws do not frustrate, but instead complement, federal securities laws. The statutory basis for Rule 10b-10 is Section 10(b) of the Exchange Act,[12] and Section 10(b) supplements and co-exists with state common and statutory laws prohibiting fraud.[13] Compliance with Rule 10b-10 does not exempt one from liability for fraudulent conduct under other theories. In *Ettinger v. Merrill Lynch, Pierce, Fenner & Smith,* 835 F.2d 1031 (3rd Cir. 1987), the Third Circuit held that liability for fraudulent conduct could be had under 10b-10's better known cousin, Rule 10b-5[14] (as well as under § 10(b) of the Exchange Act) even though the defendant may have complied with Rule 10b-10. The court noted that,

> Throughout the process of adopting and amending Rule 10b-10, the SEC has maintained that "additional information may be material and disclosure may be required . . . ." *Ettinger,* at 1035.

---

12 15 U.S.C. § 78*j*.

13 *Cf.* LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION at 3421 - 3431 (3d ed. 1992) (explaining the relation between federal securities fraud and common law deceit), and at note 79, p. 3429-30, quoting *Mansbach v. Prescott, Ball & Turben,* 598 F.2d 1017, 1024 (6th Cir. 1979):

> The implied claim for relief stated under § 10b and Rule 10b-5 is essentially the federal securities law counterpart to the common law tort of fraud. The § 10(b)/Rule 10b-5 claim is not identical to common law fraud, . . . but, particularly after *[Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)],* it is very useful to analogize between the two.

14 17 C.F.R. § 240.10b-5, Fed. Sec. L. Rep. (CCH) ¶ 22,725.

Specific conduct may, therefore, violate federal (and state) anti-fraud laws even though it technically complies with Rule 10b-10. The case specific nature of claims for misrepresentation and omissions to disclose dictate such a result. It should also be noted that the *Ettinger* court reinstated state law pendent claims for fraud at the same time that the plaintiff's 10b-5 claims were reinstated. *Id.*, at 1036.

C. Rule 10b-10 does not conflict with common law claims.

Clearly, to the extent that Petitioner could make out an anti-fraud claim based on failure to disclose material facts, the Exchange Act, which is inherently an anti-fraud statute, would not preempt state common law or statutory fraud claims. In *Medtronic,* this Court held that traditional damage remedies for violation of common law duties are not preempted when those duties parallel federal requirements. 116 S.Ct. at 2255.

State agency law is likewise, on its face, consistent with and complementary to § 10(b) and Rule 10b-10. The SEC noted in the 10b-10 amendment adopting release that common law principles govern a broker-dealer's special relationship with the customer. The SEC especially noted the broker-dealer's duty to seek the best execution available for customer orders.

> A broker-dealer's duty to seek to obtain best execution of customer orders derives, in part, from the common law agency duty of loyalty, which obligates an agent to act exclusively in the principal's best interest. Restatement 2d Agency § 387 (1958). Thus, when an agent acts on behalf of a customer in a transaction, the agent is under a duty to exercise reasonable care to obtain the most advantageous terms for the customer. Restatement 2d Agency § 424 (1958). Securities

Exchange Act Rel. 34-34902, 59 F.R. 55006, [1994-95 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,444, note 15 at page 85,851.

Thus, Rule 10b-10 is legally based upon an anti-fraud statute (Section 10(b)) which parallels state law,[15] and the SEC's rationale for adoption of the rule stems at least in part from the common law of agency. There has been no suggestion that the Second Restatement of Agency is embodied in any federal common law principal.

The Minnesota Supreme Court simply relied on the perceived importance of one national rule regarding order flow, without asking whether the Congressional foundation and agency underpinning for Rule 10b-10 would be obstructed by enforcement of state common law. The court instead found that the detailed treatment of the question in the SEC rulemaking proceeding foreclosed state laws or remedies. The mere fact that agencies normally deal with problems in far more detail than Congress does not imply preemption. *Hillsborough County v. Automated Medical Lab, Inc.*, 471 U.S. 707, 717 (1985).

Other than an interest in a national rule concerning order flow payments, which is not expressed in either the Securities Exchange Act, Rule 10b-10, or the SEC rulemaking proceeding, the Minnesota Supreme Court identified no other federal policy which would be frustrated by the rule. In addition, the common law agency concepts expressed by the court below are not unique to Minnesota, but instead appear to be statements of common law that are largely uniform in application and are based on the Second Restatement of

---

[15] *See, Mansbach v. Prescott, Ball & Turben, supra*, note18, at 1024.

Agency, particularly Sections 387 and 424, noted by the SEC in the 10b-10 amendment adopting release,[16] and on Section 388:

> Unless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal. RESTATEMENT (SECOND) OF AGENCY § 388 (1958).

The mere possibility of multiple or differing state regulatory schemes exists whenever states regulate. That is not in itself an argument for preemption. "There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity." *O'Melveny & Myers v. F.D.I.C.*, __ U.S. __, 114 S.Ct. 2048, 2055 (1994).

II. The decision below was unnecessarily broad.

The decision from Minnesota is based not on conflict with federal law but upon potential conflicts. The Court's findings below were laced with "potential" conflicts, "potential consent requirements," and remedies that "could frustrate" the objectives of Congress. This case was dismissed on preemption grounds prior to Schwab even filing an answer. No evidence is in the record on whether actual deception of the Plaintiff class occurred, whether Schwab's disclosures were adequate under Minnesota common law, or even whether order flow payments could fairly be characterized as illicit "profits" under agency law. Proof of such matters would depend on facts in individual cases, as is always the case with fraud or breach of duty claims.

---

16 Exchange Act Rel. 34-34902, *supra.*

The very difficulty of characterizing order flow payments as attributable in any specific amount to any specific customer, cited in the *Dahl* opinion, at 925, as a basis for conflict between state and federal law, suggests that the payments might not be established to be a profit attributable to the principal.

In addition, the fact that one common law remedy might ultimately be found to conflict with Congressional policy would not be the basis for a wholesale ruling that all common law duties and remedies are stricken. For example, it is easy to envision an analysis in which non-disclosure or misleading statements concerning order flow payment invokes a remedy, but that written consent might not be required because such consent could realistically obstruct the regulatory regime established by the 1994 amendments to Rule 10b-10.[17]

III. Judicial preemption is unwarranted in this case given the express language of Congress.

Finally, Section 28(a) of the Securities Exchange Act articulates the will of Congress that state law not be preempted, unless a conflict be found. The express preemption language that is contained in Section 28 supports at least an inference that Congress did not intend any additional preemption by implication. *Freightliner Corp. v. Myrick*, __ U.S.__, 115 S.Ct. 1483, 1488 (1995). Section 28 has been amended several times, including one amendment expressly with respect to

---

[17] Securities Exchange Act Release 34-34902, *supra.*

broker-dealer compensation, without preempting state law on monetary order flow payments.[18]

Congress has spoken to preemption of state securities law in the past. Indeed, the present Congress has taken up the topic of state law preemption again. Both houses of the current session of Congress have adopted separate legislation that would preempt state laws with respect to several areas of securities registration and investment company regulation. *See,* H.R. REP. No 622, 104th Cong., 2d Sess. (1996); at 16; SEN. REP. No. 293, 104th Cong., 2d Sess. (1996), at 4-5. Congress has carefully debated the role of state law in securities transactions in the past and is in the process of doing so again. It is both inappropriate and unnecessary for the Minnesota Supreme Court to make a sweeping ruling on preemption, as it has done in this case, in the face of extensive legislative debate, activity, and history on express preemption of state law regarding securities transactions. A more reasoned approach to the issue of federal preemption of state common and statutory law regarding securities transactions must be announced by this Court.

---

[18] Section 28(e)(1), 15 U.S.C. 78*bb*(e)(1), adopted in 1975, preempted state fiduciary laws prohibiting so-called "soft dollar" inducements paid to money managers. *See also,* Francis J. Facciolo & Richard L. Stone, *Avoiding the Inevitable: The Continuing Viability of State Law Claims In the Face of Primary Jurisdiction and Preemption Challenges Under the Securities Exchange Act of 1934,* 1995 Colum. Bus. L. Rev. 525, 670-671 (1995).

NASAA joins in Petitioners' argument that, in the 1975 amendments, Congress expressly preempted preexisting state regulation of soft dollar order flow but did not preempt regulation of the monetary order flow payments that are the subject of this suit. *Expression unius est exclusio alterius.* Pet. at 25-27. This *amicus* brief, however, does not separately address that argument.

CONCLUSION

For the reasons set forth in this brief *amicus curiae* and those outlined in the brief of the Petitioners, NASAA joins Petitioners in urging the Court to grant the petition for writ of certiorari and to hear the case on its merits. In the alternative, the judgement of the Minnesota Supreme Court should be vacated and the case remanded for further proceedings consistent with *Medtronic, Inc., v. Lohr*.

Date: August 15, 1996 Respectfully Submitted,

Lee Riddell Polson
(Counsel of Record)
Sheinfeld, Maley & Kay, P.C.
301 Congress Ave, Suite 1400
Austin, Texas 78701
512-474-8881

ATTORNEYS FOR *AMICUS CURIAE*
NORTH AMERICAN SECURITIES
ADMINISTRATORS ASSOCIATION,
INC.